IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-~~76~~-304

ELWIN B. BURNS,

Petitioner,

vs.

EAST BATON ROUGE PARISH SCHOOL BOARD and ROBERT AERTKER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Donald Juneau
P. O. Box 3261
Anchorage, Alaska 99510
Telephone: [907] 279-7159
Counsel for Petitioner

August 31, 1976

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Respondents.

Pursuant to Rule 23 of the Supreme Court of the United States, Elwin B. Burns files this petition for certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the District Court dismissing petitioner's 1973 lawsuit is unreported and is set out in Appendix A to this petition. The minute entry of the District Court dismissing petitioner's 1975 lawsuit is unreported and is set out in Appendix B to this petition. The opinion of the Court of Appeals affirming the dismissal is reported at 530 F.2d 1201 and is set out in Appendix C. The Order of the Court of Appeals denying petitioner's petition for rehearing is reported at 533 F.2d 1135 and is set out in Appendix D.

QUESTION PRESENTED

Whether the dismissal of petitioner's 1973 lawsuit under 42 U.S.C. §1981 for failure to state a claim for relief barred his 1975 lawsuit under Title VII of the Civil Rights Act of 1964 when both lawsuits attacked the allegedly racially discriminatory firing of petitioner by respondents in 1972.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The order of the United States Court of Appeals for the Fifth Circuit affirming the dismissal of petitioner's complaint was entered on April 29, 1976. See Appendix C. Petitioner timely filed a Petition for Rehearing and Suggestion for Hearing or Rehearing En Banc on May 6, 1976. The Court of Appeals denied the Petition on June 2, 1976. See Appendix D. This petition is being filed less than 90 days from the entry of the Order denying rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1981: Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. §1977.

42 U.S.C. §2000e-5(f)(3):

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial

district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

STATEMENT OF THE CASE

This claim for individual relief under Title VII of the Civil Rights Act of 1964 was filed by Elwin B. Burns on June 30, 1975 in the United States District Court for Middle Louisiana. Mr. Burns alleged that he was terminated as a teacher because of his race on May 31, 1972.

At the time the complaint was filed, Mr. Burns had not received a notification of the right to sue under Title VII, but upon his subsequent receipt of the notice, the District Court allowed the complaint to be supplemented.

Named as defendants were the East Baton Rouge Parish School Board (the Board) and Mr. Robert Aertker, the Superintendent of East Baton Rouge Parish Schools (the Superintendent). Mr. Burns requested injunctive and declaratory relief, back pay and punitive damages from the Board and the Superintendent.

The Board and the Superintendent moved to dismiss the complaint on grounds that the action was barred by res judicata. Mr. Burns had filed

a lawsuit in the same court on June 8, 1973 attacking his termination, which had been dismissed for failure to state a claim. Burns v. East Baton Rouge Parish School Board, Civ.No. 73-181 (M.D.La.). That case had been appealed to the Court of Appeals for the Fifth Circuit, which dismissed the appeal because it was filed out of time. Burns v. East Baton Rouge Parish School Board, No. 75-1581 (5th Cir.Mar.24, 1975).

On September 3, 1975, the District Court dismissed the suit as res judicata, and appeal was timely noticed to the Court of Appeals on September 29, 1975. The Court of Appeals affirmed the dismissal on April 29, 1976. 530 F.2d 1201. After a timely petition for rehearing and suggestion for hearing or rehearing en banc was filed on May 6, 1976, the Court of Appeals denied rehearing on June 2, 1976. 533 F.2d 1135.

REASONS FOR GRANTING THE WRIT

1. The decision below affectively denies petitioner his day in court.

Petitioner first sought to redress his allegedly discriminatory firing when he filed suit in the District Court in 1973 under the Civil Rights Act of 1866, 42 U.S.C. §1981. In its Minute Entry dismissing the lawsuit, the District Court referred to a state court action filed by petitioner based upon the same claim for relief, and stated that petitioner "may, also, raise constitutional questions in that suit if he wishes." See Appendix A. But when petitioner filed a second lawsuit in federal court attacking his termination but based upon Title VII, the same District judge dismissed the case on grounds of res judicata. Petitioner now has no remedy left because of the harsh and inflexible imposition of the res judicata rule.

2. The second lawsuit seeks different remedies and proceeds under a different theory than the first one.

This court has recently reaffirmed the difference, from a remedial and substantive point of view, of 42 U.S.C. §1981 and 1983, and Title VII. Washington v. Davis; 44 U.S.L.W. 4789 (June 7, 1976). In an action brought under §1981, the standards developed under Title VII could not be used to invalidate a written personnel test, absent proof of discriminatory intent. The year before, this court took pains to distinguish §§1981 and 1983 from Title VII in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 457-460 (1975), and concluded that §1981 did not bring in its van Title VII's panoply of substantive aids and remedial devices: "investigation, conciliation, counsel, waiver of court costs, and attorneys fees, items that are unavailable at least under the specific terms of 1981." 421 U.S. at 460.

Petitioner's first lawsuit was a §1981 action, not a Title VII one. Because he had not statutorily exhausted for purposes of Title VII until 1975, after he had filed his second lawsuit, these were issues which survived the 1973 dismissal. These issues were not actually litigated, and as a consequence, could again be raised. Moreover, since the 1973 case went off on a motion to dismiss, it is quite clear that no factual issues were passed upon, and hence petitioner should have been able to raise these in another proceeding. Restatement of Judgments § 68(2)(1942) states as follows:

> A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action.

See, e.g., Tutt v. Doby, 459 F.2d 1195 (D.C.Cir. 1972); Schmucker v. Nationwide Mutual Insurance Co., 344 F.Supp.701 (E.D.Pa.1972); Colditz v. Eastern Airlines, Inc., 329 F.Supp.691 (S.D.N.Y. 1971); Brandkamp v. Chapin, 473 S.W.2d 786 (Mo. App.1971).

3. This case raises important questions of federal procedural law.

Since this court's first, and still definitive, decision on res judicata, Cromwell v. County of SAC, 94 U.S.351 (1876), there have been a plethora of decisions applying the doctrine. In its most recent statement on the question, this court held that if there has been a full and fair litigation of a claim, then a litigant cannot again raise the issue in a subsequent proceeding. Stone v. Powell, 44 U.S.L.W. 5313, 5320-21 (July 6, 1976). That case applied the rule to a federal habeas corpus proceeding under 28 U.S.C. §2254 involving a prisoner in state custody. But it is certainly controlling here. Cf. N.L.R.B. v. Denver Building and Construction Trades Council, 341 U.S. 675, 682-683(1951). Elwin Burns has never been given an opportunity to fully and fairly litigate his claim of unlawful discharge. His case has twice been dismissed by the District Court without any consideration of the merits of his claim, and twice this dismissal has been affirmed by the Court of Appeals. He has yet to have his day in court.

Moreover, by equating petitioner's claim for relief under Title VII with his claim for relief under s1981, the decision of the Court of Appeals is in conflict with the holdings of this court in Washington v. Davis, supra and Johnson v. Railway Express Agency, Inc.

CONCLUSION

For the above and foregoing reasons, petitioner respectfully requests that his petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

DONALD JUNEAU
P. O. Box 3261
Anchorage, Alaska 99510
telephone: [907] 279-7159

Counsel for Petitioner

August 31, 1976

[APPENDIX A]

ELWIN B. BURNS

OCTOBER 4, 1973

V.

UNITED STATES
DISTRICT COURT

MIDDLE DISTRICT OF
LOUISIANA

Civ. Action
No. 73-181

EAST BATON ROUGE PARISH
SCHOOL BOARD, ET AL

This matter is before the Court on motion by the defendant, East Baton Rouge Parish School Board, to dismiss this case. No oral argument is required.

There is no question but that the procedures followed by the School Board in this case, as evidenced by the record itself, were above reproach and in compliance with state law. The plaintiff was a non-tenured teacher and as such could be dismissed upon the written recommendation of the Superintendent of Schools accompanied by valid reasons therefor. La. R.S. 17:442. As a non-tenured teacher, he was not entitled to a hearing on his dismissal unless there was evidence that he was dismissed for purely racial reasons. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). Also, there were no charges made against this plaintiff which might in any way damage his community standing, and certainly there was no stigma imposed upon him that foreclosed his freedom to take advantage of other employment opportunities. See Roth, supra, at p. 2707.

The School Board in this case, while not required to do so, did grant the plaintiff a hearing at which hearing the plaintiff and his attorney were present. While La. R.S. 17:443 speak only in terms of permanent, or tenured teachers, when it gives a discharged teacher the right to petition a court of competent jurisdiction for a full hearing to review the action taken by the School Board, nevertheless, this plaintiff has availed himself of that section and has filed suit in Louisiana's Nineteenth Judicial District Court. That suit is presently pending on the docket of the State Court. If there was a violation of the plaintiff's contract of employment, or if there was some violation of state law, the plaintiff's remedy is through his state court suit and not by an action brought before this Court. The record itself belies plaintiff's suggestion that he was discharged because of his race. It is about time that the United States District Courts be relieved of reviewing every instance of discharge of a teacher in the many schools under its jurisdiction. These are matters between the School Board and the teacher which should be resolved in the state courts if there is any violation of contractual rights involved. Louisiana law gives this plaintiff all of the relief which he needs or to which he is entitled. He has been discharged by what appears to be valid action on behalf of the school board. He was given a hearing at which his attorney was present. He now has a suit pending in the State Court attaching his discharge as a violation of state law. He may, also, raise constitutional questions in that suit if he wishes. Under the circumstances of this case, this complaint simply does not raise a question upon which relief could be granted by this Court, and therefore:

IT IS ORDERED that the motion of the defendant, East Baton Rouge Parish School Board, to dismiss this case be, and it is hereby GRANTED.

[APPENDIX B]

ELWIN B. BURNS

SEPTEMBER 3, 1975

v.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

Civ. Action No. 75-224

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL

This matter is before the Court on motion of the defendants to dismiss plaintiff's complaint as being res judicata. After due consideration of the record in this case, and after due consideration being given the memoranda filed by counsel for both parties in connection with this motion:

IT IS ORDERED that defendants' motion to dismiss this suit as "res judicata" be, and it is hereby GRANTED, and this suit is hereby DISMISSED.

[APPENDIX C]

Elwin B. BURNS, Plaintiff-Appellant,

v.

EAST BATON ROUGE PARISH SCHOOL BOARD and Robert Aertker, Individually and in his capacity as Superintendent of East Baton Rouge Parish Schools, Defendants-Appellees.

No. 75-3849
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 29, 1976.

PER CURIAM:

In this 1975 nontenured Black teacher's suit claiming racial discrimination in his discharge, the District Court held that it was barred by res judicata by reason of his 1973 suit in the same Court. Whether the 1975 suit should be characterized as the "same cause of action" as the rubric goes, *see Commissioner of Internal Revenue* v. *Sunnen*, 1948, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898, 905; *Cromwell* v. *County of Sac*, 1877, 94 U.S. 351, 352, 24 L.Ed. 195, 197; *Dove* v. *Kleppe*, 5 Cir., 1975, 522 F.2d 1369, 1374; *Stevenson* v. *International Paper Co.*, 5 Cir., 1975, 516 F.2d 103, 109-10, it is plain from the examination of both 1973 and 1975 complaints and the District Court's minute entry memoranda that at the heart of each was the basic decisive charge of racial discrimination. *See Acree* v. *Air Line Pilots Association*, 5 Cir., 1968, 390 F.2d 199, 201, *cert. denied*, 392 U.S. 852, 89 S.Ct. 88, 21 L.Ed.2d 122. It is equally plain that the Judge, in dismissing the 1973 suit on its merits, categorically rejected this claim. So if it is not barred by res judicata it surely is by collateral estoppel.

AFFIRMED.

[APPENDIX D]

UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2—Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3—Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Adcox v. Caddo Parish School Board	74-4153	6/ 1/76	W.D.La., 530 F.2d 973
Bourgeois v. Seafarers' Pension Plan	75-1049	6/ 1/76	E.D.La., 530 F.2d 973
Burns v. East Baton Rouge Parish School Board	75-3849	6/ 2/76	M.D.La., 530 F.2d 1201
Ricketts v. State of Texas	75-3663	6/ 1/76	W.D.Tex., 530 F.2d 974
Ricketts v. U. S.	75-3669	6/ 1/76	W.D.Tex., 530 F.2d 974
U. S. v. Braddy	75-3766	6/ 1/76	S.D.Ga., 531 F.2d 573
U. S. v. Griffin	75-3625	6/ 1/76	M.D.Ga., 530 F.2d 101
U. S. v. Houltin	74-4144	6/ 1/76	W.D.Tex., 525 F.2d 943
U. S. v. Texas Education Agency (Austin Independent School District)	73-3301	6/ 9/76	W.D.Tex., 532 F.2d 380
Williams v. Usery	75-3458	6/ 8/76	S.D.Fla., 531 F.2d 305
GROUP 3			
Covington v. Cole	75-1660	6/ 1/76	E.D.Tex., 528 F.2d 1365

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AND
ROBERT AERTKER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN F. WARD, JR.
Attorney at Law
Suite 313
101 St. Ferdinand Street
Baton Rouge, Louisiana 70801
(504) 387-0858

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ROBERT AERTKER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents pray that this Court deny the petition for certiorari sought by petitioner to review the decision of the United States Court of Appeals for the Fifth Circuit rendered April 29, 1976, petition for rehearing and suggestion for rehearing en banc denied May 6, 1976,

affirming the judgment of the United States District Court for the Middle District of Louisiana issued September 3, 1975.

QUESTION PRESENTED

Whether under the circumstances of this case both courts below were correct in dismissing petitioner's complaint as being barred by the doctrines of res judicata and collateral estoppel.

STATEMENT OF THE CASE

Although the statement of the case set forth at pages 3 and 4 of the petition for certiorari is substantially correct, it gives only a bare-bones picture of the procedure in, and the decisions of, the courts below. In order that the court may have a clear and complete picture of the facts and circumstances of this case, respondents would supplement the statement of the case as set forth hereafter.

The petitioner in this case, Elwin B. Burns, was previously employed by the East Baton Rouge Parish School system as a probationary teacher. Petitioner Burns was first employed by the school board for the 1969–70 school year and was dismissed on May 25, 1972, just prior to the end of his probationary term.

Louisiana's Teacher Tenure Law, LRS 17:441–444 provides that a teacher must serve a probationary period of three years before acquiring tenure as a teacher in the school system. These Statutes provide that after a teacher acquires tenure he can not be dismissed or demoted except on grounds of dishonesty, incompetency or willful neglect of duty and then only after a hearing with

at least fifteen days notice which may be public or private at the option of the teacher and at which he may be represented by counsel and call witnesses on his behalf, etc. The Statute also provides a method of judicial review.

These Statutes also provide, however, that prior to acquiring tenure, during the three year probationary period, a teacher may be dismissed by the school board upon the written recommendation of the Superintendent accompanied by valid reasons and does not require the school board to grant the teacher a pre-termination hearing. However, in this case, Petitioner *was granted* such pre-termination hearing.

Petitioner Burns was first employed by the school board for the 1969–70 school year in his area of certification and was assigned to Baker Junior High School, one of the integrated junior high schools in the East Baton Rouge Parish system. Baker Junior High School had an integrated faculty with approximately 65 percent of its teachers being white and 35 percent being black. The principal of Baker Junior High found Mr. Burns' performance as a teacher at Baker Junior High unsatisfactory. The East Baton Rouge Parish School system has long had a policy, with regard to probationary teachers who receive poor evaluations at the first school to which they are assigned, to transfer such teacher to a comparable position in a similar school. The purpose of this policy is to insure that the teacher's poor evaluation is not due to a personality conflict with the principal or other members of the school's administrative staff.

Pursuant to this policy, Petitioner Burns was transferred to Prescott Junior High for the second year, the

1970–71 school year. However, by the end of that school year, the principal at Prescott Junior High School also indicated that Mr. Burns' performance did not meet the standards required by the East Baton Rouge Parish School system.

Mr. Burns was then again transferred for a third year, the 1971–72 school year, to Westdale Junior High in the hope that his performance might still improve. Again, however, the principal and administrative staff at Westdale Junior High found Mr. Burns' performance to be less than acceptable and so indicated to the central office staff. Supervisors from the central office counseled with Mr. Burns in an attempt to help him improve his performance but all to no avail.

It must also be noted that all three of the schools to which Mr. Burns was assigned had faculties composed of approximately 35 percent black teachers and no other black teacher was, or has been, dismissed or demoted from any of those faculties.

Thereafter, the Superintendent of schools, based upon the recommendation of the three principals and their administrative staff, and his own central office staff, notified Petitioner Burns by letter dated May 2, 1972 that he was recommending Mr. Burns' dismissal to the school board. A copy of the Superintendent's written recommendation to the school board setting forth the reasons for his recommendation was attached to the notice to Petitioner Burns. At this time, Mr. Burns requested a private hearing with the school board to object to his dismissal.

Even though the Louisiana Tenure Law does not require such a hearing, the school board granted Mr.

Burns a hearing at which he was represented by counsel, an attorney from New Orleans. This hearing lasted approximately an hour during which the board heard both Mr. Burns' attorney and Mr. Burns himself. Subsequently, on May 25, 1972 the school board, at an official meeting, upheld the Superintendent's recommendation and dismissed Mr. Burns as a teacher in the East Baton Rouge Parish School system effective May 31, 1972.

Thereafter, Mr. Burns employed new counsel and filed suit, almost simultaneously, in State Court and in the United States District Court for the Middle District of Louisiana. This became Civil Action Number 73–181 on the docket of the United States District Court for the Middle District of Louisiana. The basis of the complaint and jurisdiction were alleged to be under ". . . 42 U.S.C.A. 1981, 1982 and 1983; commonly known as the civil rights act and Title VII, sec. 401 et seq., of the Equal Employment Act of 1164. . . ." Mr. Burns chose, however, to prosecute only his Federal Court action.

Defendants filed a motion with the United States District Court requesting dismissal of plaintiff's complaint for failure to state a claim upon which relief could be granted, setting forth the employment and dismissal facts generally set forth above, and denying that Mr. Burns was in any way dismissed because of his race. Plaintiff's complaint was dismissed for failure to state a claim on which relief could be granted on October 4, 1973. Plaintiff subsequently appealed that dismissal to the Court of Appeals which, on March 24, 1975, dismissed such appeal as being filed out of time. *Burns v. East Baton Rouge Parish School Board*, No. 75–1581 (Fifth Cir. 1975).

Thereafter, plaintiff employed other new counsel and on July 1, 1975 filed a new complaint, Civil Action Number 75–224 in the United States District Court for the Middle District of Louisiana against the East Baton Rouge Parish School Board and the members thereof under 42 USC 1981, 1983 and the 14th Amendment of the Constitution of the United States and Title VII of the 1964 Civil Rights Act alleging the same facts and cause of action as his previous Federal suit, i.e., that his dismissal was solely because of his race.

Examination of the record in this matter clearly reveals that both of plaintiff's complaints are virtually identical in all respects. For example, Paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of the first complaint are virtually identical to Paragraphs 4, 5 and 6 of the second complaint. Also, the allegations of subparagraphs 1, 2, 3, 4 and 5 of Paragraph 13 of the first complaint are virtually identical to Article 6 of the second complaint.

That the District Court clearly considered the merits of plaintiff's complaint in dismissing for failure to state a claim, there can be no doubt. For example, note the following language from the Court's opinion which may be found as Appendix A, page 8, of the Petition for Certiorari:

> ". . . There is no question but that the procedures followed by the School Board in this case, as evidenced by the record itself, were above reproach and in compliance with state law. The plaintiff was a non-tenure teacher and as such could be dismissed upon the written recommendation of the Superintendent of Schools accompanied by valid reasons therefor. LA. R.S. 17:442 . . ."
>
> ". . . Also, there were no charges made against this plaintiff which might in any way damage his community standing, and certainly there was no stigma imposed upon him that foreclosed his freedom to take advantage of other employment opportunities. See Roth, supra, at p. 2707 . . ."
>
> ". . . The School Board in this case, while not required to do so, did grant the plaintiff a hearing at which hearing the plaintiff and his attorney were present . . ."
>
> ". . . The record itself belies plaintiff's suggestion that he was discharged because of his race . . ."
>
> ". . . He has been discharged by what appears to be valid action on behalf of the school board. He was given a hearing at which his attorney was present . . ."
>
> ". . . Under the circumstances of this case, this complaint simply does not raise a question upon which relief could be granted by this Court, and therefore:
>
> IT IS ORDERED that the motion of the defendant, East Baton Rouge Parish School Board, to dismiss this case be, and it is hereby GRANTED. . . ."

Upon the filing of the second complaint, Civil Action Number 75–224, on July 1, 1975, defendant school board filed a motion to dismiss as being res judicata which motion was granted by the District Court on September 3, 1975. The Court below affirmed the District Court on April 29, 1976 at 530 Fed. 2nd 1201, with re-hearing denied on June 2, 1976 at 533 Fed. 2nd 1135.

REASONS FOR DENYING THE WRIT

There is no substantial Federal question and the Decisions Below Are Consistent with the Decisions of this Court, Other Decisions of the United States Court of

Appeals for the Fifth Circuit, and Do Not Conflict With Decisions of Other Circuits.

It must first be noted that this is *not* a case alleging a pattern or system of employment practices which discriminate against teachers or employees in this school system because of their race. This case involves only one teacher who alleges that he, alone, was dismissed because of his race.

It could hardly be otherwise, as Petitioner Burns was permitted to teach at three different schools before being finally dismissed prior to the expiration of his probationary period and the faculty at each of those three schools was composed of approximately 35 percent black teachers. Yet, no other black teacher at any of those three schools has been dismissed or demoted by this school board.

This is simply a case where one school board in carrying out its responsibility to provide the best possible education and the best possible teachers for its students, found that one teacher did not meet the standards it felt necessary for permanent or tenured employment in its school system. Furthermore, this decision was reached only after three different principals and their staffs, at three different schools, had found petitioner unsatisfactory and only after petitioner had been counseled and the Superintendent of schools and his central office staff had also concurred in those findings. Another indication that this school system does not discriminate against its teachers because of their race is the fact that this same school system has dismissed a tenured white teacher for improperly disciplining or punishing a black student in violation of board policies. See *Brown v. East Baton*

Rouge Parish School Board, et al, Civil Action Number CA 75-382, United States District Court, Middle District of Louisiana, April 23, 1976; see also *Brown v. East Baton Rouge Parish School Board, et al*, Number 161,593, 19th Judicial District Court, State of Louisiana, April 9, 1975.

There is no claim in the instant case of a lack of due process or that the statute under authority of which defendants acted, L.R.S. 17:441-444, is unconstitutional or that the defendant school board did not comply with the provisions and requirements of that act. Indeed, there could hardly be such complaint as this school board went beyond the requirements of the act in protecting petitioner's rights. L.R.S. 17:442, covering probationary teachers, does not require a pre-termination hearing for probationary teachers. Yet, this school board granted petitioner a pre-termination hearing at which he was represented by counsel.

Furthermore, there can be no doubt but that the conduct of the school board, and the decisions below, are consistent with this Court's decisions in *Board of Regents v. Roth*, 1972, 408 U.S. 564, 92 Sup. Ct. 2701, 33 L. Ed. 2d 548, and *Perry v. Sindermann*, 1972, 408 U.S. 593, 92 Sup. Ct. 2694, 33 L. Ed. 2d and the principles established in those and other decisions of this Court and the Courts of Appeal. See the following finding in the District Court's decision found as Appendix A at Page 8 of the Petition for Certiorari:

> ". . . Also, there were no charges made against this plaintiff which might in any way damage his community standing, and certainly there was no stigma imposed upon him that foreclosed his freedom to

take advantage of other employment opportunities therefor. See Roth, supra, at page 2707 . . ."

The District Court then went on to find that,

". . . The record itself belies plaintiff's suggestion that he was discharged because of his race . . ."

The record is also clear that petitioner intended to pursue all of his remedies in that first complaint as the complaint specifically refers to Title VII (even though the section cited should be 701 instead of 401) as well as 42 U.S.C.A. 1981, 1982 and 1983. Petitioners' appeal of this first adverse decision was dismissed by the Fifth Circuit Court of Appeals as being filed out of time on March 24, 1975. *Burns v. East Baton Rouge School Board*, No. 75-1581 (Fifth Cir., 1975).

Thereafter, on July 1, 1975, three years after his dismissal and over one year after his claim would have prescribed under Louisiana Law, petitioner filed his second complaint against the same defendants under the same 42 U.S.C. 1981, et seq., the 14th Amendment, and Title VII of the 1964 Civil Rights Act alleging the same facts and causes of action as his previous complaint, i.e., that his dismissal was solely because of his race. Defendants filed a motion to dismiss the second complaint as being barred by the doctrines of res judicata and collateral estoppel. The District Court examined both complaints, found them to be virtually identical, grounded on the same allegations of fact and the same cause of action, i.e., Burns was dismissed solely because of his race, and granted defendants' motion dismissing plaintiff's complaint as being barred by the doctrines of res judicata and collateral estoppel. Petitioner appealed this second decision of the District Court to the Court of Appeals for

the Fifth Circuit which affirmed the District Court on April 29, 1976 at 530 Fed. 2d 1201 with rehearing being denied on June 2, 1976 at 533 Fed. 2d 1135.

The doctrines of res judicata and collateral estoppel have been a part of the jurisprudence of this nation, as well as every state of the Union, virtually from the beginning of our legal history. *Cromwell v. County of Sac*, 1877, 94 U.S. 351, 352, 24 L. Ed. 195, 197; *Commissioner of Internal Revenue v. Sunnen*, 1948, 333 U.S. 591, 597, 68 Sup. Cr. 715, 719, 92 L. Ed. 898, 905; *Acree v. Airline Pilots Association*, Fifth Cir., 1968, 390 Fed. 2d 199, 201, cert. denied, 393 U.S. 852, 89 Sup. Cr. 88, 21 L. Ed. 2d 122; *Carr v. United States*, 507 Fed. 2d 191 (Fifth Cir. 1975); *Dore v. Kleppe*, Fifth Cir., 1975, 522 Fed. 2d 1369; *Stevenson v. International Paper Company*, Fifth Cir. 1975, 615 Fed. 2d 103. The doctrines of res judicata and collateral estoppel are also present in the law and jurisprudence of the State of Louisiana.

The policy in support of the doctrine of res judicata and collateral estoppel rests on the proposition that litigation ultimately must end and become conclusive as to the matters in contention between the parties to a suit. It recognizes the necessity of repose among the parties and the courts, as well as the inequity of subjecting one party to the burdens of repetitious litigation. In the context of the present case, where this Court has previously held that there can be no doubt of the right of a state to investigate the competence and fitness of those whom it hires to teach in its schools, *Adler v. Board of Education*, 342 U.S. 485, 72 Sup. Ct. 380, 96 L. Ed. 517 and *Shelton v. Tucker*, 364 U.S. 479, 81 Sup. Ct. 247, 5 L. Ed. 2d 231, it should also recognize the necessity for

repose and stability in such determinations by our educational institutions.

The Court below has recently set forth the rules governing examination of causes of action with respect to the applicability of the doctrines of res judicata and collateral estoppel in *Acree v. Airline Pilots Association*, 390 Fed. 2d 199, cert. denied 393 U.S. 852 and *Carr v. United States*, 507 Fed. 2d 191 (Fifth Cir. 1975). In those cases it found that among the items which courts look for which makes causes of action similar are similar form, grounds for relief, allegation of rights, allegation of wrongs, evidence, and demand for remedies. The Courts have also held that the doctrines of res judicata and collateral estoppel apply to dismissals for failure to state a claim upon which relief can be granted under Federal Rules of Civil Procedure 12 (b) (6) and 41 (b) in *Hall v. Tower Land and Investment Company*, 512 Fed. 2d 481 (Fifth Cir. 1975) citing *Wasoff v. American Automobile Insurance Company*, 451 Fed. 2d 767 (Fifth Cir. 1971) and *Wessinger v. United States*, 423 Fed. 2d 795 (Fifth Cir. 1970-en banc). It is also clear that res judicata is available in actions based on 42 U.S.C. 1983 under *Preiser v. Rodriguez*, (1973) 411 U.S. 475, 93 Sup. Ct. 1827, 36 L. Ed.2d 439, citing with approval *Coogan v. Cincinnati Bar Assn.*, 431 Fed. 2d 1209, 1211 (CA6 1970); *Jenson v. Olson*, 353 Fed. 2d 825 (CA8 1965); *Rhodes v. Meyer*, 334 Fed. 2d 709, 716 (CA8 1964); *Goss v. Illinois*, 312 Fed. 2d 257 (CA7 1963), and Title VII under *Stebbins v. Nation Wide Mutual Insurance Company*, 11 FEP cases 672. The doctrine of collateral estoppel has also been applied in *American Heritage Life Insurance Company v. Heritage Life Insurance Company*, 494 Fed. 2d 3 (Fifth Cir. 1974), to a case involving a 12 B 6 dismissal and a state administrative agency determination. See also *Lawlor v. National Screen Service Corporation*, 349 U.S. 322, 75 Sup. Ct. 865, which held these doctrines applicable to a judgment of dismissal with prejudice although not applying the doctrine in that case because the Court in the first case did not file reasons or findings (as did the District Court here) and because of further wrongful acts of the defendants after the first suit and prior to the second suit. In the instant case, all wrongful acts alleged to have been committed by defendants occurred prior to the first suit.

It would appear clear therefore that all of the decisions of this Court, the decisions of the Court below and other Courts of Appeal, mandate the application of the doctrines of res judicata and collateral estoppel in this case. Petitioner contends, as he did in his first suit, that he has been discriminated against because of his race. He complains that the decisions of the three principals at the three different schools to which he was assigned, other supervisory personnel, the Superintendent, and finally the school board in finding his performance unsatisfactory and ultimately dismissing him as a teacher, were based solely on his race. These were the allegations and cause of action in his first suit and remained the allegations and cause of action in his second suit. All allegations of misconduct or wrongful acts on the part of the defendants occurred during the three year period covering the 1969–70, 1970–71, and 1971–72, school years, all prior to the filing of his first complaint. The District Court rendered judgment, with reasons, adverse to petitioner on his first complaint. Upon examina-

tion of plaintiff's second complaint, finding it to contain the same basic allegations and cause of action, the District Court held petitioner's second complaint to be barred by the doctrines of res judicata and collateral estoppel. The Court below, after examination of the record and the two complaints, affirmed the District Court. Clearly, the Petition for Certiorari should be denied.

The Petition for Certiorari cites and relies primarily on decisions of this Court in *Johnson v. Railway Express Agency*, 421 U.S. 454, 44 L. Ed. 2d 295, 95 Sup. Ct. 1716 (1975); *Washington v. Davis*, 44 U.S.L.W. 4789 (1976); *Stone v. Powell*, 44 U.S.L.W. 5313, (1976); *N.L.R.B. v. Denver Building and Construction Trades Counsel*, 341 U.S. 675, 71 Sup. Ct. 943; and *Tutt v. Doby*, 459 Fed. 2d 1195 (DC Cir. 1972). We respectfully submit however that these cases do not actually support petitioner's position and in some instances are completely inapplicable to this case.

Although it is true that this Court did indicate, in *Johnson*, supra, that 42 U.S.C. 2000, et seq. and 42 U.S.C. 1981, et seq. are two different statutes providing different procedures and remedies, there is no language whatsoever in that decision which would indicate that a judgment, with reasons, rendered adverse to plaintiff by a United States District Court in a suit against the same defendants on the same facts and cause of action under one of those statutes would not act as a bar under the doctrines of res judicata and collateral estoppel to a second suit brought in that same District Court by the same plaintiff against the same defendants on the same facts and cause of action under the other statute. All that this Court held in *Johnson* was that these were different

statutes with different procedures and remedies and that bringing an action under one did not toll the running of the statute of limitations with respect to the other. Furthermore, it is clear that petitioner intended to pursue the remedies available under both statutes in both the first and second lawsuit as the first complaint refers to 42 U.S.C. 1981 et seq. and Title VII and the second complaint also refers to 42 U.S.C. 1981 et seq. and Title VII.

Even if petitioner had not intended to utilize both statutes in both of his complaints the jurisprudence is still clear that the adverse judgment in the first suit should be an absolute bar to his second suit. The test for determining applicability of the doctrines of res judicata and collateral estoppel have long been established and are clearly enunciated by the Court below in its decisions in *Stevenson v. International Paper Company, Mobile, Alabama*, (1975) 516 Fed. 2d 103 and *Dore v. Kleppe*, (1975) 522 Fed. 2d 1369. A very thorough discussion of the tests to determine applicability of the doctrines of res judicata and collateral estoppel is found in *Stevenson*, supra, at pages 108–110. And, although the Fifth Circuit Court of Appeals did not apply the doctrine of res judicata in the *Stevenson* case, it is clear that the present case falls within the test established by the Court below in *Stevenson*. For example, the Fifth Circuit said in *Stevenson*:

> ". . . For a prior judgment to bar a subsequent action, it is firmly established (1) that the prior judgment must have been rendered by a Court of competent jurisdiction; (2) that there must have been a final judgment on the merits; (3) that the parties, or those in privity with them, must be identical in both

suits; and (4) that the same cause of action must be involved in both suits. . . .

. . . This Court has recognized that the principle test for comparing causes of action is whether or not the primary right and duty and delict or wrong are the same in each action. . . .

. . . Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments? . . ."

It is clear that the instant case falls within the confines of that test. The parties are identical, there was a prior final judgment on the merits by a Court of competent jurisdiction, and the same cause of action is involved in both suits. It is also clear, with regard to the cause of action, that the primary right and duty and delict or wrong are the same in each action, i.e., the right not to be dismissed solely because of his race with the wrong being an unlawful discriminatory dismissal of this employee solely because of his race. It is also clear that the same evidence would sustain both judgments and that a different judgment in the second action would impair rights under the first judgment, i.e., the right of the students and employer to have a satisfactory, competent teacher in place of an unsatisfactory teacher and the right to employment of the teacher employed to replace the petitioner.

It should also be noted, with respect to the *Johnson* decision, that the doctrine of res judicata was applied by the Sixth Circuit Court of Appeals and their decision on that issue was not included in this Court's grant of certiorari. In the first *Johnson* suit, the District Court had

granted the motion for summary judgment filed by two of the defendants, two unions, holding that the plaintiff had no claim against them under the 1964 Civil Rights Act. In the second *Johnson* suit, the District Court dismissed Johnson's claims against the two unions on grounds of res judicata, holding that the present suit (brought under Title VII) involved the same parties and the same subject matter decided in the first action where summary judgment had been granted. The District Court also held that res judicata barred Johnson's claims against REA on the issue of supervisory training. On appeal, the Sixth Circuit Court of Appeals affirmed the res judicata holdings of the District Court. See *Johnson v. Railway Express Agency, Inc.* (1973) 489 Fed. 2d 525 at 527 and 530, Footnote 1, wherein the Court of Appeals said:

"The District Court held that many of the issues raised by the plaintiff in his second suit were decided against him in the first action in which the Court granted summary judgment against the plaintiff, and reconsideration was barred by the doctrine of res judicata. Johnson did not appeal from these summary judgments. We agree with the District Court that the unions have a complete defense on the ground of res judicata and that the company likewise has such defense only so far as the claim of improper supervisory training is concerned."

This Court's decision, after granting certiorari, noted the Sixth Circuit's application of res judicata at 44 L. Ed. 2d 295 at 299, Footnote 3, saying:

". . . The claims against the unions were dismissed on res judicata grounds. App. 101a. The Court of Appeals agreed with that disposition. 489 Fed. 2d 525, 530 n 1 (CA6 1973). *This issue, also, was not*

included in our grant of certiorari . . ." (emphasis added)

It must also be noted that petitioner relied heavily on *Johnson v. Railway Express Agency, Inc.*, supra, in the Court below. That decision was necessarily given very careful consideration by the Court below in determining the applicability of res judicata and collateral estoppel under the test laid down by that Court in its previous decisions in *Acree*, *Dore*, and *Stevenson*, supra, as well as other decisions of this Court, before also concluding that the instant case is barred by the doctrines of res judicata and collateral estoppel.

There would also appear to be little support for the position of petitioner in the other cases cited in the petition and some seem to have no applicability to the instant case whatsoever. *Washington v. Davis*, (1976) 44 U.S.L.W. 4789 involves an attack by two Negro applicants for positions in the Washington, D.C. Police Department whose application had been rejected because they failed to pass a certain test required by the department. The only issue before the Court was whether or not the Court of Appeals erred in applying the standards established by *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), a case involving the interpretation and application of Title VII standards to an employment test, in determining whether or not the employment test was discriminatory as against blacks. That issue revolved around facts such as a disproportionate number of blacks failing the examination and whether or not the standard to be applied would be the normal constitutional standard requiring an intent or purpose to discriminate or the stricter standard that the mere effect of

a disproportionate number of blacks failing the test was sufficient to show invidious discrimination. The question of res judicata was not involved and was not even discussed.

There is no such issue in the instant case. There was no test involved and no pattern of discrimination in employment practices. In fact, the ratio of black to white teachers in the East Baton Rouge Parish School System reflects approximately the ratio of black to white population in the parish. That ratio of black and white teachers has remained substantially as it was at the time this school system converted to a unitary school system in 1970 with perhaps a slight increase in the percentage of black teachers. Clearly, *Washington* does not support the position of petitioner.

Stone v. Powell, (1976) 44 U.S.L.W. 5313 involved a habeas corpus preceding attacking a State Court conviction which was based, at least in part, on evidence obtained in an illegal search or seizure. Here, the facts and law are totally different from the instant case and the question of res judicata was not an issue and was not mentioned. This case would seem to have no applicability whatsoever to the instant case.

Tutt v. Doby, 459 Fed. 2nd 1195 (1972), although involving the issue of res judicata, is totally different on its facts from the instant case and also gives petitioner no support. In *Tutt*, the first suit was a suit by a landlord against a tenant for eviction and return of possession of the premises. The second suit was a suit by the same landlord against the same tenant for back rent. The first complaint did not allege any rent to be due and the tenant vacated the premises permitting a default judgment

to be entered against him. Obviously, that judgment for eviction, in which past due rent was neither alleged nor sought, could not be a bar to a subsequent complaint seeking past due rent which was not involved in the first suit. Therefore, the *Tutt* case is also totally inapplicable to the facts and circumstances of the instant case.

N.L.R.B. v. Denver Building and Construction Trades Council, et al, 341 U.S. 675, 71 Sup. Ct. 943 also involves facts, circumstances and issues totally different from the facts, circumstances and issues in the case at bar, even though res judicata and collateral estoppel were an issue. This case involved a suit against the building and construction trades council under the National Labor Relations Act charging unfair labor practices. The regional attorney for the Labor Relations Board had sought a preliminary injunction in another suit entitled *Sperry v. Denver Building and Construction Trades Council* pending a determination of the issues on the merits but that suit had been dismissed by the District Court on the ground that the actions complained of did not affect interstate commerce.

In the subsequent complaint and action on the merits, *N.L.R.B. v. Denver*, it was contended that the *Sperry* dismissal acted as a bar under the doctrine of res judicata. This Court merely held that as the District Court in the first suit did not have before it for determination the merits of the controversy but only the question of preliminary relief pending final determination on the merits under a separate section of the act, i.e., the causes of action and purposes of the two complaints were different, res judicata was not applicable. Once again, the facts and circumstances of that case are totally different from the instant case and offer petitioner no support.

Consequently, respondents respectfully submit that the Petition for Certiorari raises no substantial Federal question and that the decision of the Courts below are consistent with the decisions of this Court and decisions of the Appellate Courts.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted:

JOHN F. WARD, JR.
Counsel for Respondent
Suite 313
101 St. Ferdinand Street
Baton Rouge, Louisiana 70802
(504) 387-0858

CERTIFICATE

I, John F. Ward, Jr., Attorney for Respondents, and a member of the Bar of the United States Supreme Court, do hereby certify that on this 22nd day of October, 1976, I served copies of the foregoing Brief for Respondent In Opposition on the attorney of record for the petitioner herein, Mr. Donald Juneau, by mailing three copies of same, postage prepaid, to him at his office at Post Office Box 3261, Anchorage, Alaska, 99510.

JOHN F. WARD, JR.